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IN THE

# Supreme Court of the United States

October Term, 1970

No. 1580

CASCADE CAR WASH,

*Petitioner,*

*vs.*

LAURENT WATCH CO., INC., doing business as CASCADE CAR WASH,

*Debtor-Respondent.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

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## SUBJECT INDEX


| | Page |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statutory Provisions Involved | 3 |
| Statement of the Case | 3 |


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## INDEX TO APPENDICES


| | |
|---|---|
| Appendix A. Findings of Fact and Conclusions of Law | 1 |
| Appendix B. Findings of Fact and Conclusions of Law Regarding Application to Require Removal of Personal Property | 9 |
| Appendix C. Findings of Fact and Conclusions of Law re Modification of Order of August 7, 1968 to Maintain Restraining Order in Full Force and Effect | 15 |
| Appendix D. Order Affirming Referee's Orders of August 7, 1968, August 21, 1968, and September 6, 1968 | 22 |
| Appendix E. Opinion of the Ninth Circuit Court of Appeals | 24 |
| Appendix F. Code of Civil Procedure §1161 | 26 |
| Appendix G. Section 791, California Code of Civil Procedure | 29 |

## TABLE OF AUTHORITIES CITED


| Cases | Page |
|---|---|
| Barcroft and Sons Co. v. Collum, 217 Cal. 708 | 14 |
| Hartman Ranch Co. v. Associated Oil Co., 10 Cal. 2d 232, 73 P. 2d 1163 | 10 |
| Reed v. South Shore Foods, Inc., 329 Cal. App. 2d 705 | 11, 12 |
| Stout, In re, 109 Fed. 794 | 15 |
| **Statutes** | |
| Bankruptcy Act, Sec. 24c | 2 |
| Bankruptcy Act, Sec. 39c | 3, 14 |
| California Civil Code, Sec. 791 | 3, 10 |
| California Civil Code, Sec. 4395 | 13 |
| California Code of Civil Procedure, Sec. 1161 | 3, 10 |
| California Code of Civil Procedure, Sec. 2074 | 13 |
| United States Code, Title 28, Sec. 1265(1) | 2 |
| **Textbook** | |
| 30 California Jurisprudence 2d, Sec. 215, p. 363 | 10 |

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*Debtor-Respondent.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

Petitioner Cascade Car Wash, Inc., a California corporation, being aggrieved by orders of the Referee in Bankruptcy and subsequent affirmations thereof, (sometimes called "Cascade"), respectfully petitions for a writ of certiorari to reverse the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on the 15th day of January, 1971.

**Opinion Below.**

The Findings of Fact, Conclusions of Law and Order of the Honorable Norman W. Neukom, Referee in Bankruptcy, filed Aug. 7, 1968 (Appendix A, *infra* page 1) is not reported.

The Findings of Fact and Conclusions of Law and Order thereon, made by the said Honorable Norman

W. Neukom on August 21, 1968. (Appendix B, *infra* page 9), is not reported.

The Findings of Fact, Conclusions of Law and Order of the said Honorable Norman W. Neukom, filed September 6th, 1968 (Appendix C, *infra,* page 15), is not reported.

The Order of the District Court, entered February 19, 1969 (Appendix D, *infra,* page 22) is not reported. ported.

The opinion of the Ninth Court of Appeals, entered January 15th, 1971, (Appendix E, *infra,* page 24), is not yet reported.

**Jurisdiction.**

The judgment of the Court of Appeals, Ninth Circuit, was entered on the 15th day of January, 1971. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1265(1) and Section 24c of the Bankruptcy Act.

**Questions Presented.**

It is respectfully submitted the following questions are before this Court:

1. Was the instrument by which Laurent Watch Co., Inc. took possession of the real premises an assignment of a lease or a sublease?

2. If in fact a tender of rent could be made, was the tender of rent actually a valid and legal tender?

3. Whether certain property affixed to real property was actually personal property?

4. Did the Bankruptcy Court have the right to amend its order of August 7th, 1968?

## Statutory Provisions Involved.

Bankruptcy Act, Section 39c, provides as follows:

> "A person aggrieved by an order of the referee may, within ten days after the entry thereof or within such extended time as the court upon petition filed within such ten-day period may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Unless the person aggrieved shall petition for review of such order within such ten-day period, or any extension thereof, the order of the referee shall become final. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as well protect the rights of all parties in interest."

Section 1161 California Code of Civil Procedure (Appendix F, *infra*, page 26).

Section 791 California Civil Code (Appendix G, *infra*, page 29).

## Statement of the Case.

The factual situation is perhaps complicated, but the same is set forth as concisely as possible.

The above entitled proceedings were instituted by the filing of a petition under Chapter XI of the Bankruptcy Act on the 5th day of July, 1968, by Laurent Watch Co., Inc., doing business as Cascade Car Wash, hereinafter referred to as the Debtor.

On or about the 14th day of August, 1963, Cascade Car Wash, Inc., hereinafter known and designated as Cascade (it should be pointed out that Cascade Car Wash, Inc. and the debtor, Laurent Watch Co., Inc. doing business as Cascade Car Wash, are separate entities), entered into a bare ground lease with Charles Wagner Enterprises of certain property located at 1045 North La Brea Avenue in the City of Los Angeles, for which Cascade was to pay $2,500.00 per month, plus taxes and assessments. (While of no significant importance to this petition, the above lease encompassed a larger portion of real property than that subsequently occupied by the debtor under its alleged lease.) The said lease further obligated Cascade to, and it in fact did place improvements thereon consisting of a car wash facility, together with all necessary buildings, at a total cost of approximately $190,000. The lease was for 29 years and provided in event of termination thereof, prior to expiration of the term, all of the improvements thereon would become the property of Lessor, but at the expiration of the 29-year term any and all improvements belonged to Cascade, with the right to remove the same.

An important factor in this matter is this lease provided for a fifteen day notice of any default.

On August 1st, 1966, Cascade entered into a written sublease with George, Nathan, Ann and Edna B. Ostrin, (hereinafter referred to as the Ostrins), for that portion of the real property upon which the car wash facility was located, the Ostrins to pay $1650 a month, plus taxes. Cascade sold to the Ostrins the car wash facilities, including the car wash equipment and the buildings, in consideration of which Ostrins executed a written promissory note in favor of Cascade dated Au-

gust 2nd, 1966, in the principal sum of $160,000. To secure the said Note, Ostrins executed in favor of Cascade a Security Agreement, also dated the 2nd day of August, 1966, under the terms of which Cascade took back a security interest in all of the personal property which had been conveyed to the Ostrins. Also, on the 18th day of July 1966, Ostrins had executed in favor of Cascade, a document entitled "ASSIGMENT OF SUBLEASE AS COLLATERAL SECURITY". This, among other things, entitled Cascade to re-enter in the event of default. The security interest in the personal property given by the Ostrins included all items which were found to be real property by the Courts.

On the 12th day of April, 1967, the Ostrins sold their interest in the lease and the car wash facility to William Wyatt. By way of implementation Ostrins on May 12th, 1966, executed to Wyatt a written "ASSIGNMENT OF SUBLEASE", and on the same document a covenant entitled "ASSUMPTION OF LEASE" was executed by Wyatt. On the same day, Wyatt executed in favor of the Ostrins, an "ASSIGNMENT OF SUBLEASE AS SECURITY".

Subsequently, the debtor, desiring to acquire the facility from Wyatt, offered to purchase from Wyatt his right title and interest in the car wash facilities and the leasehold interest for $290,000.44. On December 20th, 1967, debtor and Wyatt executed certain escrow instructions covering the aforesaid transactions. Further, by written document entered into in January of 1968, Wyatt executed in favor of the debtor an "ASSIGNMENT OF SUBLEASE", subject to the prior assignments of Sublease as security, and the debtor executed on the same document a covenant entitled "ASSUMPTION OF LEASE", in which he agreed among other things to pay the rent of $1,650 a month.

The sale and transfer of the car wash and lease from Wyatt to the debtor called for debtor to assume all liabilities which Wyatt had incurred in connection with his purchase and/or operation of the car wash, including but not by way of limitation, the liability of Wyatt under the Ostrins' promissory note to Cascade, which then had a balance of approximately $136,000 (plus an additional $25,000 owing to the American Oil Company), which was secured by the security interest in the personal property, as aforesaid, and the balance to be paid in monthly installments.

The debtor entered into possession of the premises and operated the car wash facility for a period from about the 29th day of January, 1968, to about the 5th day of July, 1968, at which time the instant proceedings commenced. It should be noted the debtor discontinued operation on July 5, 1968, and no debtor operation was ever had from that date to the present, and no rentals have ever been paid, tendered or received by Cascade, who was and has been compelled to make any and all payments on the various obligations incurred in connection with contracts due for equipment and payment of rent to the master lessor. In an endeavor to mitigate its loss, Cascade aid take over operation on October 8, 1968, and Cascade was compelled to and did agree to be liable for any and all expenses in connection with the operation of the facility.

During that period the debtor paid to Cascade the monthly rental of $1,650 for the months of February, March and April, and paid the second installment of the real property taxes in the amount of $1,530. In connection, however, with the promissory note on the personal property, assumed by the debtor, only one installment of $2,211 was paid in February of 1968.

On or about the 25th day of March, 1968, Cascade served upon the debtor "NOTICE OF DEFAULT" for default under the terms of the Security Agreement covering the personal property. Pursuant to the NOTICE OF DEFAULT Cascade proceeded with foreclosure proceedings upon the security, published a NOTICE OF SALE, as required, and a foreclosure sale was had on May 28th, 1968, and at the said sale Cascade purchased all of the personal property secured by the Ostrins' promissory note by bidding in the sum then due under the obligation, to wit, the approximate sum of $133,000.

The rental payment due the first day of May, 1968, not having been made when due, on May 9th, 1968, Cascade caused to be served upon the Ostrins, Wyatt and debtor a "THREE-DAY NOTICE TO PAY RENT OR QUIT". In the Notice, all parties were notified they were required to pay the rent due on May 1st, 1968, as well as to pay the sum of $133,000, plus interest accruing under the terms of the aforesaid promissory note. No payment of the rent was made or tendered in the said three-day period.

On May 14th, 1968, Cascade instituted in the Superior Court of the County of Los Angeles, an action for Unlawful Detainer against Ostrins, Wyatt and the debtor, based upon the "THREE-DAY NOTICE TO PAY RENT OR QUIT", and an answer was filed thereto by the debtor. On July 2nd, 1968, upon application of Cascade an order, after hearing, was entered by the Superior Court giving possession of the premises to Cascade, conditioned upon the posting of a $25,000 bond. Before the bond could be filed, and on July 5th, 1968, debtor filed a petition under Chapter XI of the Bankruptcy Act.

In the course of the proceedings before the Referee in Bankruptcy on this matter one Richard Rosenberg, an attorney testified his firm represented the debtor. He testified he had had discussions with Walter S. Barnes, attorney for Cascade in late May, 1968, and that Mr. Barnes took the position his client, Cascade, would not accept the rent upon the premises because the Three-Day Notice To Pay Rent had passed with no payment, and further, Mr. Barnes believed that before the parties would be able to make any agreements, there would have to be made some agreements relative to the payments on the Ostrins-Cascade note which had been assumed by the debtor. Mr. Rosenberg further testified that on or about May 22nd, 1968, by letter to Mr. Barnes, he affirmed the position of the debtor, to wit, that it was bound only to make the rental payments; that the lease between Wagner and Cascade called for a fifteen day notice of default, and there was tendered in said letter payment for the monthly rental. At no time was the money, or rent in question, physically tendered, placed in a bank account, or deposited in the Superior Court where the Unlawful Detainer action was pending, but merely tendered in words.

There was further testimony by Mr. Rosenberg to the effect there had been delivered to his firm by the debtor, $1,000 which might have been for the rent payment in question, but that Mr. Rosenberg actually did not know the purpose of said money, Mr. Kirshner, the president of debtor testified that on May 22nd, 1968, the day that Mr. Rosenberg's letter was sent to the attorney for Cascade, the debtor's bank account indicated a balance of approximately $2200, and further admitted that on March 4th, 1968, a check for

$2,211.40 had been returned by the Bank with the notation, "Not sufficient funds". That the said check of $2,211.40 had not been paid, and was still outstanding and not paid at the time of the hearing.

The next matter is the question of the Bankruptcy Court modifying and extending its order of August 7th, 1968, by a subsequent order dated September 6th, 1968. Briefly, on August 7th, 1968, the Court made an order wherein it was determined and stated there was to be paid to Cascade by August 29th, 1969, the sum of $4,950.00 for past due rent. No Petition for Review on this portion of the order was ever pursued. That order was not honored, and instead there was an application and subsequent order dated September 6th, 1968, modifying the order of August 7th, 1968. As of the date of the writing of this memorandum, that $4,950 has not been paid.

In connection and in relation to the order of the Court determining that the canopies belonged to the debtor, the debtor introduced merely a series of photographs depicting the car wash facilities, which photographs showed the structures as well as the car wash equipment and accessories. The president of the debtor testified the buildings were affixed to the realty by way of concrete foundation. However the very items determined by the Court to be real property were on the various agreements *re* sale of personal property listed thereon and were given as security for the performance of the agreements to purchase personal property. The right to remove at expiration of lease was given to all sublessees.

It is respectfully submitted the lower Courts have failed to correctly apply the law as to the exact legal

status between Cascade and the debtor, to wit, was the debtor an assignee of the lease or was it in possession as a sublessee. The distinction is of utmost importance because the legal rights of the parties are different in each instance. As pointed out in *30 Cal. Jur. 2d 363*, Par. 215, "there is a distinction between the assignment of a lease and subletting, in that in the case of an assignment, no reversionary interest remains in the assignor. He conveys his full unexpired interest to his assignee. But if the lessee reserves a right of reentry for breach of conditions, he has a contingent reversionary interest and the transaction then constitutes a sublease, rather than an assignment to the same effect *Hartman Ranch Co. v. Associated Oil Co.* (Nov. 26, 1937), 10 Cal. 2d 232, 242, 73 P. 2d 1163. This is important in the matter before us because, under the terms of the lease between Wagner and Cascade, it provided a fifteen-day notice was to have been given of any default, and, of course, during that period lessee had the right to cure the same. In the case before us, a Three Day Notice was given to pay rent or quit, and during the three-day period the default was not cured. The debtor contended that Cascade had failed to give the 15-day notice of default and the Three Day Notice to Pay Rent or Quit was not proper. Cascade contended the debtor was nothing more than a sublessee, and by reason thereof, a Three-Day Notice to Pay Rent or Quit, as given, was entirely proper, that at the expiration of the three-day period and without the default having been cured, the lease then and there terminated and the debtor had no further right, title or interest in the said property. (Sect. 1161 Calif. Code, Civil Procedure Appendix F, *infra,* page 26; Sect. 791 Calif. Civil Code, Appendix G, *infra,* page 29.)

Now, examining the facts in this case, we find the following:

Wagner leased the premises in question to Cascade;

Cascade in turn subleased a portion of the premises to Ostrins, and in connection therewith took back an assignment of the only lease as security for the personal property contract.

Ostrins transferred to Wyatt, but when Ostrins transferred they did not transfer the sublease, as they had originally received the same, rather they transferred the sublease which was subject to a condition, namely, security for another agreement, which was the agreement to purchase the property. Further, Ostrins took back a security agreement in the sublease as consideration for the monies owing to them under the terms of the agreement between themselves and Wyatt.

When Wyatt transferred the property to debtor he was now transferring a piece of property which was subject to two conditions that had never existed when the property was transferred to the Ostrins, namely, the assignment of the sublease in question as security for the performance of the obligation to purchase the personal property.

Therefore, it is respectfully believed that there was not and could not have been an assignment of the sublease, but rather, a sublease was entered into certainly as between Ostrins and Wyatt, and Wyatt and the debtor, and since the original sublease as between Cascade and Ostrin was not assigned as the same was transferred to Ostrins, then there cannot be an assignment, but there is a sublease.

If there be a sublease, then the matter of *Reed v. South Shore Foods, Inc.*, 329 Cal. App. 2d 705 (Sept.

15, 1964) applies. In this instance, the original lease between one Lowe and Reed provided that there was a thirty-day notice which must be given of default. Reed then transferred the lease to a corporation, namely, South Shore Foods, Inc. The corporation becoming delinquent, Reed served a Three-Day Notice demanding payment of rent, the curing of other delinquencies and stating an intention to declare a forfeiture in the absence thereof. Payment was not made within the three day period. The Court pointed out in this case the transfer of the whole of the leasor's interest in the lease is an assignment, but a transfer of a portion of a lessee's interest is a sublease. When a transfer is a sublease, the transferor becomes the landlord and the transferee the subtenant, and the latter is not in privity with the head lessor. Further, as pointed out by the Court:

> "If, by the terms of the conveyance, be it in the form of a lease or by an assignment, new conditions with right of reentry or new clauses of forfeiture are created, then the tenant falls by different tenure and a new leasehold interest arises which cannot be treated as assignment or a continuation of the original term."

The Court in *Reed v. South Shore Foods Inc., supra* found that the three-day notice given was sufficient. It is therefore respectfully submitted that the three-day notice given here was proper and that the lower Courts have failed to recognize this factor, which can only be cured by this Honorable Court.

Now, the next question is concerning the tender of the rent. Cascade of course, contends there being no attempt within the three-day period to cure the default, that any further attempt to cure the same does not consitute a completed performance.

However, without conceding for the moment that the three-day notice was improper, debtor did not have the ability to perform. While the Code of Civil Procedure of the State of California, Section 2074, states an offer in writing to pay a particular sum of money is, if not accepted, equivalent to the actual production and tender of the money, Section 4395 of the Civil Code of the State of California provides an offer of performance has no effect if the person making it is not able and willing to perform according to the offer.

The testimony in the case is plain; that the debtor did not have the ability to perform. The witness for the debtor, Mr. Rosenberg, stated they did not have funds in their account with which to make their alleged written offer effective, further Mr. Rosenberg testified that if they were holding any money for rent, and it appears there may have been a thousand dollars on hand, no instructions had been given by the debtor as to the disposition of the same, and, further, the evidence indicates there was insufficient monies in the bank account of the debtor from whence to draw the check, even if the monies in the hands of the attorney was sufficient.

It is therefore, respectfully submitted the tender was of no force and effect because of the inability to comply with same.

The next factor to be considered is the question of the Court deciding that certain fixtures constituted real property because they had become attached or fixed to the property. It is respectfully submitted that the property in question had always been by the parties themselves of such a nature as to constitute personal property. That the sale which was made by Cascade to Os-

tins, by Ostrins to Wyatt, and by Wyatt to the debtor, each conveyed their interest in the contract or agreement for sale of personal property, and that particular agreement contained in itself the words that the canopies, steel buildings, etc., were security and were personal property. It is interesting to note that even the debtor itself executed a document stating the buildings in question were given as security for the obligation to Mr. Wyatt. The only evidence shown by the debtor to the contrary were a series of photographs. It is respectfully represented that photographs do not in and of themselves constitute clear and convincing evidence as to the intent of the parties. As was stated in the matter of *Barcroft and Sons Co. v. Collum* (April 23, 1933), 217 Cal. 708:

> "Whether or not an article annexed to the real property is a fixture is a question of fact determined upon the evidence in that particular case."

Relative to the question of the Court extending its order of August 7th, 1968, the primary authority for the Bankruptcy Court to modify an order is found in Section 39c of the Bankruptcy Act, which in essence provides for a review of any order of the Court. It does recite upon the application of any party in interest, the execution or enforcement of the order complained of may be suspended by the Court upon such terms as will protect the right of all parties in interest. First of all, there was no petition for review pursued by the debtor, and, certainly, it would appear the order of the Court had become final. Even suggesting for the

moment the Court had the right to suspend the execution or enforcement of the order complained of, the Sections state sufficient must be done so as to protect the right of all parties in interest, and we ask ourselves how and in what manner has Cascade been protected, and the answer is Cascade has not been protected in any manner whatsoever. And the very order made by the Court, to wit, that there be paid $4,950.00, for past due rent has not been complied with by the debtor, even to the date of this petition. It is, furthermore, respectfully submitted that the so-called Chapter XI proceedings as in truth and fact nothing more than a liquidation, and this matter should be a "straight bankruptcy". The announced plan of the debtor contemplates the sale of the facilities to a third party and either the receipt of the purchase funds in a lump sum or a downpayment and the balance over a period of time. This certainly is a liquidation rather than a true Chapter XI proceeding.

There is just one more matter which will be briefly alluded to, and that is the question that a Referee's Findings of Fact must be accepted, unless they are clearly erroneous, Bankruptcy General Order, No. 47. As pointed out in *In re Stout* (Sept. 17, 1900), West District Court, Missouri, 109 Fed. 794, states:

> "It is the recognized rule of Federal Courts, and especially in matters of bankruptcy that on review of the decision of a Referee, based upon his conclusions upon questions of fact, the Court will not reverse his findings unless the same are so manifestly erroneous as to invoke the justice of the Court."

It is submitted the "erroneous rule" theory relates to a conflict of facts before a Court, but that the matter involved here is a question of law and a correct application of the law, and not necessarily questions of fact.

For the reasons as heretofore set forth, it is respectfully submitted to this Honorable Court that a Writ of Certiorari should be granted.

Dated: April 13, 1971.

SLATE & LEONI,
A Professional Corporation,
By ANDREW F. LEONI,
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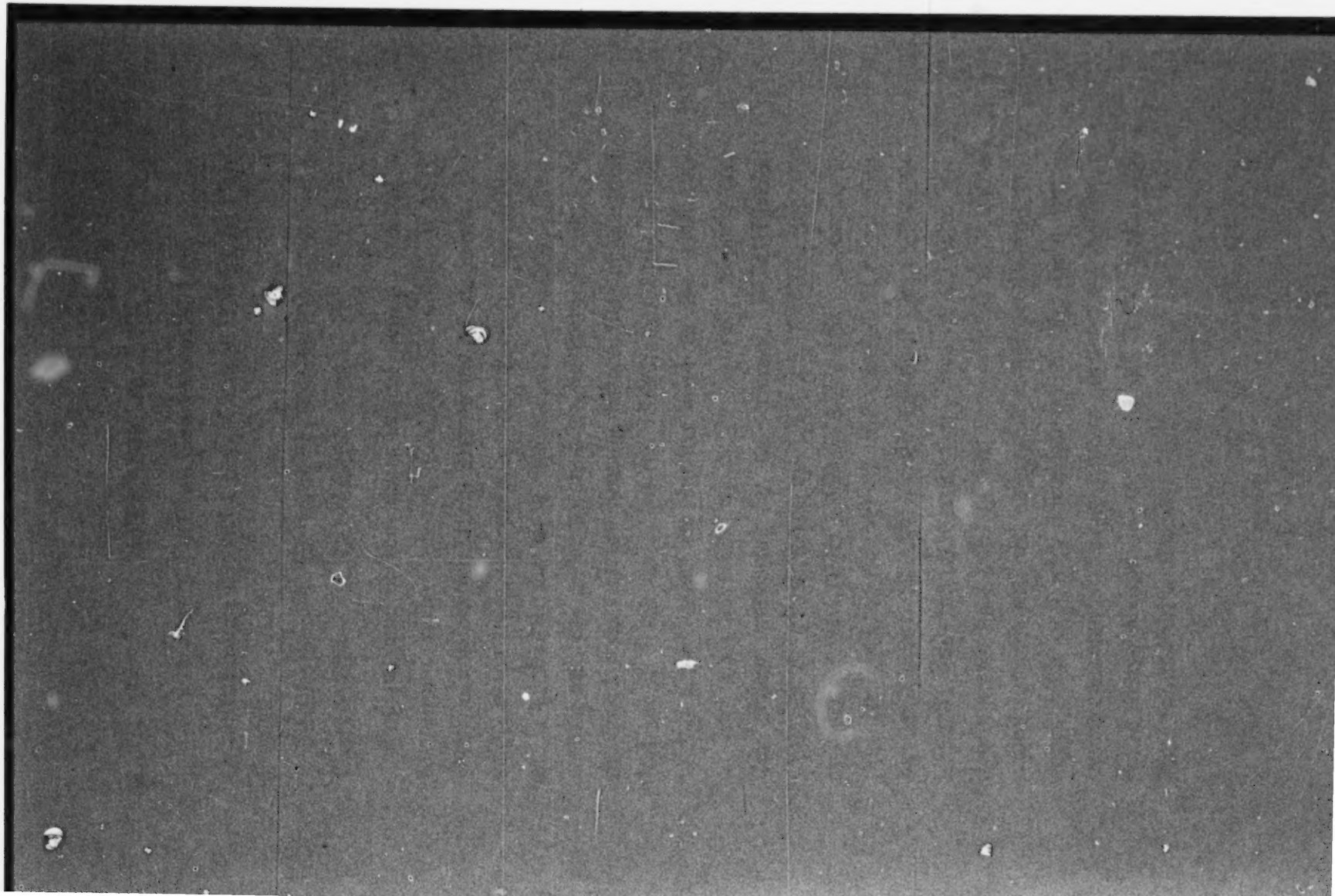

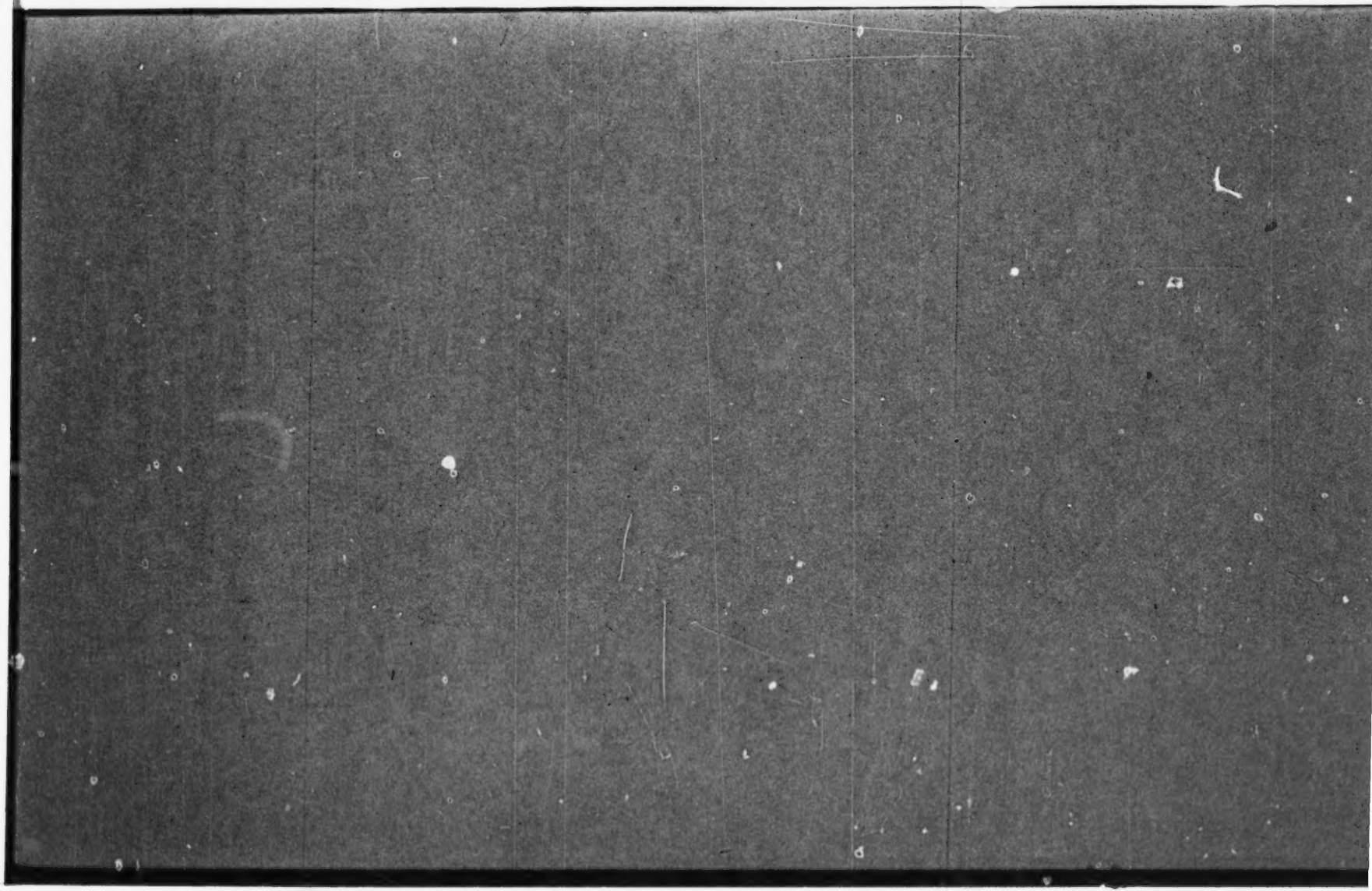

## APPENDIX A.

### Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

In the Matter of Laurent Watch Co., Inc., dba Cascade Car Wash, Debtor. No. 38914.

The petition of the above-named debtor, seeking a restraining order against CASCADE CAR WASH, INC., a corporation, from attempting to dispossess the said debtor from the premises occupied by the debtor at 1045 North La Brea Avenue, Los Angeles, California, and the order to show cause thereon, came on duly and regularly for hearing before the undersigned Referee in Bankruptcy on the 15th day of July, 1968, and was continued for further trial to the 17th day of July and the 19th day of July, 1968, respectively, the debtor appearing by its counsel, BERNFELD, COHEN & FREEMAN by LEE J. COHEN; the respondent, CASCADE CAR WASH, INC., a corporation (hereinafter referred to as "Cascade") appearing by its counsel, SLATE AND LEONI by ANDREW LEONI; and the matter having been tried upon the debtor's aforesaid petition and the order to show cause issued thereon and the answer of CASCADE; and evidence both oral and documentary having been introduced on behalf of the respective parties; and the court being fully advised in the premises, now makes its Findings of Fact as follows:

## FINDING OF FACT

### I

That the above debtor, prior to the institution of the above-entitled proceeding, conducted a car washing business located at 1045 North La Brea Avenue, Los Angeles, California. That said debtor occupied the aforesaid premises under and pursuant to the terms of a written sublease, dated August 1, 1966, entered into between CASCADE and GEORGE OSTRIN, NATHAN OSTRIN, N. OSTRIN and EDNA B. OSTRIN (hereinafter collectively referred to as the "Ostrins"). Said sublease is hereinafter referred to as the "Ostrin Sublease." Said sublease was subsequently assigned by the original sublessees to a WILLIAM R. WYATT, and thereafter subsequently assigned to the above-named debtor, who went into possession and occupancy of the premises in or about the month of January, 1968.

### II

That on or about May 14, 1968, CASCADE instituted an action in unlawful detainer against, among others, the above-named debtor, in the Los Angeles Superior Court, under Action No. 932228. Said unlawful detainer action alleged that the Ostrin sublease had been assigned to WILLIAM R. WYATT, thence to the above-named debtor as hereinabove found. Said complaint in unlawful detainer alleges that a "Notice to Pay Rent or Quit" dated May 9, 1968, had been served upon, among others, the above-named debtor, notifying the debtor that it was delinquent in the monthly installment of rent due May 2, 1968, in the amount of $1,650.00, and payment of the balance of principal and interest due under a promissory note in the amount of $132,924.59, which note was originally executed by

the Ostrins and is hereinafter referred to as the "Ostrin Note." The said unlawful detainer complaint alleged that the assignment of the aforesaid sublease to the debtor was given as additional collateral security to secure the said indebtedness of $132,924.59.

III

The said indebtedness of $132,924.59 represented the unpaid balance due under the terms of the OSTRIN note which was in the original principal sum of $160,893.86, dated August 2, 1966, and executed in favor of CASCADE. Said OSTRIN note was secured by a security interest in certain personal property located on the premises at 1045 North La Brea Avenue, Los Angeles, California. That on or about May 28, 1968 CASCADE foreclosed upon its security interest in and to the aforesaid personal property by public sale, and bid in and bought the said personal property at the foreclosure sale for the total sum of $132,904.-00. As a result thereof, the obligation and indebtedness evidenced by the aforesaid promissory note was thereby extinguished and discharged.

IV

That the above-named debtor paid a monthly rental of $1,650.00 to CASCADE as required by the terms of the assignment of the OSTRIN sublease for the months of January, February, March and April, 1968. That in the month of April, 1968, the said debtor was advised by CASCADE that it would not accept rental payments unless accompanied by an installment payment due under the terms of the OSTRIN promissory note. That in the months of April and May, 1968, the debtor did tender payment of the rental for the month of May, 1968 to CASCADE, which tender was refused.

V

That the above debtor had no knowledge and was not on notice of the purported assignment of the OSTRIN sublease to CASCADE to secure the indebtedness evidenced by the OSTRIN promissory note. Moreover, CASCADE has by its conduct, waived and is estopped to assert the assignment of the OSTRIN sublease as security for the OSTRIN note as against the above-named debtor; and the purported assignment of the OSTRIN sublease as collateral security for the OSTRIN note is void by reason of the provisions of California Civil Code Section 2889. Finally, the OSTRIN note, purportedly secured by said alleged assignment was discharged and extinguished on May 28, 1968, by reason of the foreclosure sale, referred to hereinabove, and that as a result thereof, there cannot be nor was there subsequent to May 28, 1968, any security interest in favor of anyone in or under said OSTRIN sublease.

VI

That the above-named debtor was, at the institution of the above-entitled proceeding, and now is in lawful possession of the premises located at 1045 North La Brea Avenue, Los Angeles, California. The OSTRIN sublease under which the debtor holds possession of said premises has been neither terminated nor forfeited, the court finding that the said debtor was excused from making payment in the month of May, 1968, for the May rental by reason of CASCADE'S unlawful and improper insistence that said rental payment must be made and would be accepted only on condition that the installment payment due on the OSTRIN note was also made concurrently. Notwithstanding, the court finds that CASCADE is entitled to payment of rental

for the month of May, 1968, and for any subsequent months during which the said debtor remains in possession of the said premises.

VII

That the debtor has title to the leasehold covering the aforesaid premises under and pursuant to the assignment of the said OSTRIN sublease which has approximately 25 years to run. That the fair value of said share leasehold interest is $50,000.000; the fair value of the leasehold interest with the buildings affixed thereon is in the sum of $110,000.00; that the fair value of the leasehold interest with the buildings and personal property constituting the car washing equipment is in the sum of $210,000.00. By reason thereof, the debtor has a valuable and important asset in the said leasehold which may be available for liquidation and distribution to its creditors.

CONCLUSIONS OF LAW

Based upon the aforesaid Findings of Fact, the court makes its Conclusions of Law as follows:

I

That the above-named debtor has a subsisting leasehold interest in and to the premises located at 1045 North La Brea Avenue, Los Angeles, California, under and by virtue of the assignment of a sublease dated August 1, 1966. That said sublease is presently in effect, and has neither been terminated nor forfeited. That the above named debtor is entitled to possession of the premises aforesaid.

II

That the leasehold interest of the above debtor represents a valuable and important asset in the debtor's

estate, and that by reason thereof, the restraining order by which it has sought to restrain CASCADE from attempting to dispossess it from the said leasehold interest should be granted, subject to reasonable limitations and conditions as follows:

1. That said restraining order be and remain in effect to and including August 29, 1968, at the hour of 11:00 A.M. and if on or before said date, CASCADE or its attorneys have then paid the sum of $4,950.00 either in the form of a Cashier's Check on a reputable Los Angeles bank, or by certified check, then the restraining order should be extended and continued in force and effect to and in including September 30, 1968. In the event that the payment of the said sum of $4,950.00 is not made on or before August 29, 1968, then this restraining order shall automatically terminate at the hour of 11:00 A.M.

III

That the court enter its order restraining and enjoining CASCADE from taking any action to attempt to dispossess the above debtor from the premises located at 1045 North La Brea Avenue, Los Angeles, California, with limitations and conditions hereinabove provided.

DATED: August 7, 1968.

/s/ Norman W. Neukom,
Referee in Bankruptcy

**Order.**

United States District Court, Central District of California.

In the Matter of Laurent Watch Co., Inc., dba Cascade Car Wash, Debtor. No. 38914.

Filed: Aug. 7, 1968.

The petition of the above-named debtor, seeking a restraining order against CASCADE CAR WASH, INC., a corporation, from attempting to dispossess the said debtor from the premises occupied by the debtor at 1045 North La Brea Avenue, Los Angeles, California, and the order to show cause thereon, came on duly and regularly for hearing before the undersigned Referee in Bankruptcy on the 15th day of July, 1968, and was continued for further trial to the 17th day of July and the 19th day of July, 1968, respectively, the debtor appearing by its counsel, BERNFELD, COHEN & FREEMAN by LEE J. COHEN; the respondent, CASCADE CAR WASH, INC., a corporation (hereinafter referred to as "Cascade") appearing by its counsel, SLATE AND LEONI by ANDREW LEONI; and the matter having been tried upon the debtor's aforesaid petition and the order to show cause issued thereon and the answer of CASCADE; and evidence both oral and documentary having been introduced on behalf of the respective parties; and the court having entered its findings of fact and conclusions of law and based thereon,

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that LAURENT watch co., INC., the above-named debtor, is in possession, and is entitled to continue possession of the premises located at 1045 North La Brea Avenue,

Los Angeles, California, pursuant to the terms of a written sublease dated August 1, 1966, heretofore assigned to said debtor. Said sublease is presently in force and effect and has neither been terminated or forfeited; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that CASCADE CAR WASH, INC., its agents, servants and employees be and they are hereby restrained from attempting to dispossess, or oust the above-mentioned debtor from possession of the premises located at 1045 North La Brea Avenue, Los Angeles, California; and

IT IS FURTHER ORDERED that upon conditions that there is paid to CASCADE CAR WASH, INC. by the hour of 11:00 A.M. on August 29, 1968, the sum of $4,950.00 either by Cashier's or Certified Check drawn upon a reputable Los Angeles bank, the restraining order herein contained shall automatically be extended to and including September 30, 1968, at the hour of 5:00 P.M. In the event that said payment of $4,950.00 is not made to CASCADE CAR WASH, INC. on or before August 29, 1968, at the hour of 11:00 A.M., this restraining order shall automatically dissolve and be of no further force and effect.

Dated: August 7, 1968.

/s/ Norman Neukom,
Referee in Bankruptcy

## APPENDIX B.

**Findings of Fact and Conclusions of Law Regarding Application to Require Removal of Personal Property.**

United States District Court, Central District of California.

In the Matter of Laurent Watch Co., Inc. dba Cascade Car Wash, Debtor. No. 38914.

Filed: Aug. 21, 1968.

The application of LAURENT WATCH CO. for Order to Show Cause to Require Removal of Personal Property came on for hearing before the undersigned Referee in Bankruptcy on the 13th day of August, 1968, the above debtor appearing by its counsel BERNFELD, COHEN & FREEMAN by LEE J. COHEN; the respondent CASCADE CAR WASH, INC., a corporation (hereinafter referred to as CASCADE) appearing by its counsel, SLATE AND LEONI by ANDREW LEONI; and the matter having been tried upon the debtor's application and Order to Show Cause and the answer of CASCADE; and evidence both oral and documentary having been introduced on behalf of the respective parties, and the Court being fully advised in the premises, now makes its Findings of Fact as follows:

### FINDINGS OF FACT

### I

The above debtor has a valuable and subsisting leasehold interest in the premises located at 1045 North La Brea Avenue, Los Angeles, California under and pursuant to the terms of an existing sublease hereto fore assigned to it, all as heretofore determined by

the Court in Findings of Fact and Conclusions of Law dated August 7, 1968, in the above entitled matter.

II

Debtor has received an offer to purchase the bare leasehold interest without any buildings or fixtures thereon for a purchase price of $50,000 or in the alternative an offer to purchase its leasehold interest together with the buildings located thereon for a purchase price of $110,000.

III

Prior to May 28, 1968, CASCADE had a security interest in the personal property located on the debtor's premises above described, which personal property consists generally of mechanical car washing equipment which can be easily removed from the premises. That on said date CASCADE foreclosed upon its security interest at a public foreclosure sale, and purchased all of the aforesaid personal property and is now the owner thereof.

IV

That there is situate upon the premises at 1045 North La Brea Avenue, certain metal buildings and structures permanently affixed to the realty. Said buildings and structures include generally an office building, the canopy covering the car wash rack itself affixed by means of steel girders imbedded into the realty with concrete, and adjacent affixed structures, all as depicted in applicant's photographs thereof, Exhibit D6 A through H in evidence to which reference is hereby made. That said photographs also depict certain car washing equipment and accessories including a vacuum unit, a chain and auto washing devices which are removable and not affixed to the realty, which are the personal property of CASCADE.

V

The Court finds that all of the aforesaid buildings and structures are part of the realty and of the debtor's leasehold. That said buildings and structures were not subject to CASCADE's personal property security interest, but are part and parcel of the leasehold interest presently owned by the debtor. That the debtor therefore has the right to sell and convey the right to the use and occupancy of said buildings and structures in connection with any sale of its leasehold interest, lease or otherwise, free and clear of any claims of Cascade.

VI

That the presence of the personal property belonging to CASCADE and now located on the debtor's premises constitutes an obstruction to applicant's ability to consummate a sale of its leasehold interest, making the consummation of such a sale impossible and said personal property should accordingly be removed from said premises by CASCADE.

## CONCLUSIONS OF LAW

Based upon the aforesaid Findings of Fact the Court makes its Conclusions of Law as follows:

I

That the above debtor has a valuable leasehold interest in the premises located at 1045 North La Brea Avenue, and that said leasehold includes all of the buildings and structures affixed to and located upon the said premises.

II

The debtor has a present and existing right to sell and convey its leasehold interest in the aforesaid prem-

ises which includes the exclusive right to its occupancy and use of the realty, and the buildings and structures affixed thereto.

III

That certain personal property belonging to CASCADE and consisting generally of the mechanical car washing equipment is now located upon the debtor's premises, without right. The presence of said property is causing irreparable harm to the debtor in that its presence prevents the consummation of a sale of the debtor's leasehold interest. That said personal property should therefore be ordered removed.

DATE August 21, 1968.

/s/ Norman W. Neukom,
Referee in Bankruptcy

**Order.**

United States District Court, Central District of California.

In the Matter of Laurent Watch Co., Inc., dba Cascade Car Wash, Debtor. No. 38914.

Filed Aug. 21, 1968.

The application of LAURENT WATCH CO. for Order to Show Cause to Require Removal of Personal Property came on for hearing before the undersigned Referee in Bankruptcy on the 13th day of August, 1968, the above debtor appearing by its counsel BERNFELD, COHEN & FREEMAN by LEE J. COHEN; the respondent CASCADE CAR WASH, INC., a corporation (hereinafter referred to as CASCADE) appearing by its counsel, SLATE AND LEONI by ANDREW LEONI; and the matter having been tried upon the debtor's application and Order to Show Cause and the answer of CASCADE; and evidence both oral and documentary having been introduced on behalf of the respective parties; and the Court having entered its Findings of Fact and Conclusions of Law and based thereon,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above named debtor has an existing valuable leasehold interest in the premises located at 1045 North La Brea Avenue which includes all of the buildings and structures situated thereon together with the exclusive right of occupancy and use thereof which the debtor may sell, transfer, convey or assign, free and clear of any and all claims by CASCADE.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that CASCADE shall remove all of the personal property owned by it, located upon the debtor's premises, but that execution of this order to remove shall be deferred until such time as the Court shall make a further order requiring immediate removal which shall be entered upon the debtor's application therefore evidencing a good faith agreement for the purchase of its leasehold interest, and providing for adequate consideration therefore.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that nothing herein contained shall in any wise derogate from or modify the terms of the order of Court heretofore entered on August 7, 1968.

DATED: August 21, 1968.

/s/ Norman W. Neukom,
Referee in Bankruptcy

## APPENDIX C.

**Findings of Fact and Conclusions of Law re Modification of Order of August 7, 1968 to Maintain Restraining Order in Full Force and Effect.**

United States District Court, Central District of California.

In the Matter of Laurent Watch Co., Inc., dba Cascade Car Wash, Debtor. No. 38914.

Filed: Sep. 6, 1968.

The Debtor's application to maintain the restraining order heretofore issued by the above-entitled Court on the 7th day of August, 1968, in full force and effect, having regularly and duly come on for hearing before the undersigned Referee in Bankruptcy on the 29th day of August, 1968; the Debtor appearing through its counsel, BERNFELD, COHEN & FREEMAN, ESQS. by Barry V. Freeman, Esq. and respondent Cascade Car Wash, Inc., appearing through its counsel, SLATE & LEONI, ESQS. by Andrew F. Leoni, Esq. and the matter having been duly tried upon the Debtor's verified application filed herein on August 28, 1968, and the Court having received evidence and having heard the statements of counsel and being fully apprised on the premises, now makes its Findings of Fact as follows:

I

That the above-entitled Debtor filed its original Chapter XI petition on July 5, 1968, that in connection with the filing of said petition the above-entitled Court issued its Order to Show Cause and Restraining Order enjoining and restraining Cascade Car Wash, Inc., (hereinafter referred to as "Cascade") from attempting to dispossess or oust the Debtor from its possession of the

premises located at 1045 North La Brea Avenue, Los Angeles, California 90038.

II

That a hearing on said Order to Show Cause was heard by the undersigned Referee in Bankruptcy, on July 15, 17, and 19, 1968 at the termination of which the above-entitled Court entered its Findings of Fact and Conclusions of Law and order thereon on August 7, 1968. That said order restrains Cascade from attempting to dispossess or oust the Debtor from the premises located at 1045 North La Brea Avenue, Los Angeles, California 90038, where the Debtor conducted a car wash business. That said Findings of Fact and order determined that the Debtor owned a leasehold interest in said premises and fixtures having a value of $110,000.00 and the Debtor has a substantial asset in said leasehold which may be available for the benefit of the Debtor's unsecured creditors.

III

That as a condition to the order of August 7, 1968, the Court required the Debtor to deliver to Cascade by August 29, 1968 at the hour of 11:00 A.M. the sum of $4,950.00 by cashier's check or certified check representing the rent due Cascade. That if said moneys were not paid then the restraining order mentioned herein was to dissolve.

IV

That this Court in its Findings of Fact and Conclusions of Law and order dated August 21, 1968, determined that certain buildings and structures located on the premises were fixtures and some items of easily removable personal property belonged to Cascade. That

said order requires Cascade to remove the personal property owned by it.

V

That the Court has granted an extension of time within which to Petition for Review from the order of August 7, 1968, to Cascade up to and including September 9, 1968.

VI

That on or about August 28, 1968, the above-entitled Debtor received an offer to purchase its leasehold interest for the sum of $112,000.00 and has opened escrow for the sale of said assets to Robert E. Wilson, Jr., dba Super Sudzer Car Washes for a total purchase price of $112,000.00. That the sum of $16,-000.00, representing the down payment of the Debtor's assets has been deposited in American City Bank, Wilshire and Grand, Los Angeles, California 90017.

VII

That this Court has confirmed said sale at a hearing held on the 29th day of August, 1968. That the terms of the sale are evidenced by a written agreement between the parties, which agreement has been recived in evidence as Debtor's No. 1. That it is a condition to the close of the escrow for the sale that the orders of this Court dated August 7, 1968 and August 21, 1968, become final. That the Court has been advised by counsel for Cascade that it intends to file a Petition for Review from this Court's order of August 21, 1968, as well as its order of August 7, 1968. That the contract of sale (Debtor's No. 1) provides in paragraph 16 that all moneys due Cascade shall be paid through escrow.

VIII

That by virtue of the fact that said escrow for the sale cannot close until the orders become final, and Cascade is preventing this condition from being met, it is impossible for the Debtor to pay the rent due Cascade as required by the order of August 7, 1968.

IX

That in order to preserve the equity the Debtor has in its assets and avoid immediate irreparable injury to the unsecured creditors of the Debtor and to avoid a forfeiture of the Debtor's assets which are extremely valuable, the restraining order heretofore issued on August 7, 1968, must continue in full force and effect up to and including September 9 [NWN] 30, 1968, at the hour of 4:30 P.M. That such a modification of the order of August 7, 1968 will permit the Petition for Review to be filed and heard and the orders become final so that the sale and escrow may close and Cascade receive the rent lawfully to it, but will prevent a forfeiture of the assets of the Debtor to Cascade.

CONCLUSIONS OF LAW

I

The Debtor presently owns a leasehold interest in the premises located at 1045 North La Brea Avenue, Los Angeles, California 90038, which leasehold interest has a value along with the fixtures attached thereto in the sum of $110,000.00.

II

That this Court as a Court of equity has inherent jurisdiction to reconsider and modify the order of August 7, 1968, in order to accomplish equity and preserve the assets of the Debtor for the unsecured creditors and to avoid a forfeiture thereof to Cascade. That the

Court in light of the facts described herein and the escrow for the sale of the Debtor's assets which has been opened does reconsider its order of August 7, 1968, insofar as said order provides that the restraining order issued against Cascade shall dissolve on August 29, 1968, at the hour of 11:00 A.M.

III

That said restraining order must be continued in full force and effect to prevent Cascade from attempting to dispossess the Debtor from its leasehold interest up to and including the 30th day of September, 1968, at the hour of 4:30 P.M. to allow time for the orders of August 7, 1968 and August 21, 1968, to become final.

IV

If any of the foregoing Findings of Fact shall properly be construed to be a Conclusion of Law, it shall be so deemed. Conversely, if any Conclusion of Law, it shall be so deemed. Conversely, if any Conclusion of Law shall properly be construed as a Finding of Fact, it shall be so deemed.

Dated at Los Angeles, California, this 6 day of Sept,. 1968.

/s/ Norman W. Neukom
Norman W. Neukom
Referee in Bankruptcy

Findings approved and 5 day lodging as per Local Rule 7.

Slate & Leoni
By Andrew F. Leoni
Andrew F. Leoni
Attorneys for Cascade Car Wash, Inc.

**Order Continuing Restraining Order in Full Force and Effect.**

United States District Court, Central District of California.

In the Matter of Laurent Watch Co., Inc., dba Cascade Car Wash, Debor. No. 38914.

Filed: Sept. 6, 1968.

The Debtor's application to maintain the restraining order heretofore issued by the above-entitled Court on the 7th day of August, 1968, in full force and effect having regularly and duly come on for hearing before the undersigned Referee in Bankruptcy, on the 29th day of August 1968; the Debtor appearing through its counsel, BERNFELD, COHEN & FREEMAN, ESQS. by Barry V. Freeman, Esq. and respondent Cascade Car Wash, Inc., appearing through its counsel, SLATE & LEONI, ESQS. by Andrew F. Leoni, Esq. and the matter having been tried upon the Debtor's verified application filed herein on August 28, 1968, and the Court having received evidence and having heard the statements of counsel and being fully apprised on the premises and having entered its Findings of Facts and Conclusions of Law:

IT IS HEREBY ORDERED that the order of August 7, 1968, is hereby modified and the restraining order contained therein shall not expire on August 29, 1968, at 11:00 A.M. but shall remain in full force and effect through September 30, 1968, at the hour of 4:30 P.M.

IT IS FURTHER ORDERED that Cascade Car Wash, Inc., its agents, servants, employees and attorneys be and they hereby are restrained from attempting to dispossess or oust or in any manner whatsoever interfere with the Debtor's possession on the premises located at 1045 North La Brea Avenue, Los Angeles, California 90038.

Dated at Los Angeles, California, this *6th* day of *Sept.* 1968.

/s/ NORMAN W. NEUKOM,
*Referee in Bankruptcy.*

## APPENDIX D.

**Order Affirming Referee's Orders of August 7, 1968, August 21, 1968, and September 6, 1968.**

United States District Court, Central District of California.

In the Matter of Laurent Watch Co., Inc., dba Cascade Car Wash, Debtor. In Proceedings Under Chapter XI No. 39914-HW.

The three Petitions for Review having been filed in the above entitled proceeding by CASCADE CAR WASH, INC., seeking to review the Referee's orders of August 7, 1968, August 21, 1968, and September 6, 1968, having duly and regularly come on for hearing before the Honorable HARRY C. WESTOVER, United States District Judge, on February 10, 1968; CASCADE CAR WASH, INC., appearing by its counsel, SLATE AND LEONI by ANDREW F. LEONI, and the Debtor, LAURENT WATCH CO., INC., appearing by its counsel, BERNFELD, COHEN & FREEMAN by LEE J. COHEN, and the Court having considered the written briefs and oral arguments offered on behalf of the respective parties, and good cause appearing.

IT IS HEREBY ORDERED AND ADJUDGED that the Referee's orders of August 7, 1968; August 21, 1968, and September 6, 1968, being supported by Findings of Fact and Conclusions of Law which are not clearly erroneous, be and each of them are hereby affirmed, and that the relief sought by the petitioner

CASCADE CAR WASH, INC., in each of the three Petitions for Review is denied; and

It appearing to the Court that the Cross-Petition of the Debtor seeking to review the Referee's order of September 6, 1963, having been superseded by his order of October 28, 1968, has been rendered moot thereby,

IT IS FURTHER ORDERED that the Debtor's Cross-Petition for Review is hereby dismissed.

DATED: February 19, 1969.

Harry C. Westover
United States District Judge

## APPENDIX E.

### Opinion of the Ninth Circuit Court of Appeals.

United States Court of Appeals, for the Ninth Circuit.

Cascade Car Wash, Inc., Appellant, vs. Laurent Watch Co., Inc., Appellee. No. 24,259.

Filed: Jan. 15, 1971.

Appeal from the United States District Court for the Central District of California.

Before: DUNIWAY, HUFSTEDLER and KILKENNY, Circuit Judges.

PER CURIAM:

Cascade Car Wash, Inc. appeals from a decision of the United States District Court affirming three orders of a Referee in Bankruptcy entered in favor of Laurent Watch Co., Inc., the petitioner in a proceeding under Chapter XI of the Bankruptcy Act (11 U.S.C. §§701-799). We affirm.

Cascade's principal challenge is to an order of August 7, 1968 in which the Referee found that Laurent, as the assignee of a written sublease which had been neither terminated nor forfeited, had a continuing and valuable leasehold interest in certain premises and that Cascade should be restrained from attempting to oust Laurent from possession. Cascade contends that the lease was forfeited when Laurent failed to cure its default in payment of the May, 1968 rental installment within the statutory three-day-notice period. Cal. Civ. Code § 791.

We have reviewed the record and conclude that the Referee's finding that the lease was not forfeited is not clearly erroneous. Rule 52(a), F.R.Civ.P. The lease

documents in question clearly show successive assignments of a written sublease and not, as Cascade argues, a series of successive subleases. The written sublease expressly provides for fifteen days notice in the event of a default, which was not given. In addition, there is ample evidence in the record to support the Referee's finding that Laurent made a timely tender of the May rental installment which was improperly rejected by Cascade.

Cascade also attacks an order of August 21, 1968 in which the Referee found that certain buildings and structures affixed to the land were a part of Laurent's leasehold interest. Whether or not an object annexed to real property is a fixture is a question of fact. *R. Barcroft & Sons Co. v. Cullen,* 1933, 217 Cal. 708, 711. The record supports the Referee's determination.

Cascade's final contention, that the Referee had no jurisdiction to modify his order of August 7, 1968, is without merit.

Affirmed.

## APPENDIX F.

### Code of Civil Procedure §1161.

§ *1161.* [*Unlawful detainer defined.*] A tenant of real property, for a term less than life, or the executor or administrator of his estate heretofore qualified and now acting or hereafter to be qualified and act, is guilty of unlawful detainer:

*1.* [*Possession after expiration of term.*] When he continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him; provided such expiration is of a nondefault nature however brought about without the permission of his landlord, or the successor in estate of his landlord, if any there be; including the case where the person to be removed became the occupant of the premises as a servant, employee, agent or licensee and the relation of master and servant or employer and employee or principal and agent or licensor and licensee has been lawfully terminated or the time fixed for such occupancy by the agreement between the parties has expired; but nothing in this subdivision contained shall be construed as preventing the removal of such occupant in any other lawful manner; but in case of a tenancy at will, it must be terminated by notice, as prescribed in the Civil Code.

*2.* [*Possession after default in rent.*] When he continues in possession, in person or by subtenant, without the permission of his landlord, or the successor in estate of his landlord, if any there be, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment, stating the amount which is due, or possession of the property,

shall have been served upon him and if there is a subtenant in actual occupation of the premises, also upon such subtenant.

Such notice may be served at any time within one year after the rent becomes due. In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than 60 days after the expiration of the term without any demand of possession or notice to quit by the landlord or the successor in estate of his landlord, if any there be, he shall be deemed to be holding by permission of the landlord or successor in estate of his landlord, if any there be, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during said year, and such holding over for the period aforesaid shall be taken and construed as a consent on the part of a tenant to hold for another year.

*3.* [*Possession after failure to perform conditions of lease, etc.*] When he continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him, and if there is a subtenant in actual occupation of the premises, also, upon such subtenant. Within three days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may

be, and thereby save the lease from forfeiture; provided, if the conditions and covenants of the lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed herein, need be given to said lessee or his subtenant, demanding the performance of the violated conditions or covenants of the lease.

A tenant may take proceedings, similar to those prescribed in this chapter, to obtain possession of the premises let to a subtenant or held by a servant, employee, agent, or licensee, in case of his unlawful detention of the premises underlet to him or held by him.

*4.* [*Subletting, etc., contrary to lease.*] Any tenant, subtenant, or executor or administrator of his estate heretofore qualified and now acting, or hereafter to be qualified and act, assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his lease, or maintaining, committing, or permitting the maintenance or commission of a nuisance upon the demised premises or using such premises for an unlawful purpose, thereby terminates the lease, and the landlord, or his successor in estate, shall upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of such demised permises under the provision of this chapter.

*5.* [*Failure to deliver up possession as specified in written notice.*] *When he gives written notice as provided in Section 1946 of the Civil Code of his intention to terminate the hiring of the real property, or makes a written offer to surrender which is accepted in writing by the landlord, but fails to deliver up possession at the time specified in said written notice, without the permission of his landlord, or the successor in estate of the landlord, if any there be.* [Amended by Stats 1961 ch 782 § 1.]

## APPENDIX G.

### Section 791, California Code of Civil Procedure.

[Re-Entry, when and how to be made.] Whenever the right of re-entry is given to a grantor or a lessor in any grant or lease or otherwise, such re-entry may be made at any time after the right has accrued, upon three days' notice, as provided in sections 1161 and 1162, Code of Civil Procedure; provided, however, that the said three days' notice shall not be required in cases where the hiring of real property is for a term not specified by the parties and where such hiring was terminated under and in accordance with the provisions of section 1946 of the Civil Code.

SUPREME COURT, U. S.

IN THE

# Supreme Court of the United States

Supreme Court, U.S.
FILED
MAY 11 1971
E. ROBERT SEAVER, CLERK

October Term, 1970

No. 1580

CASCADE CAR WASH,

*Petitioner,*

vs.

LAURENT WATCH CO., INC., doing business as CASCADE CAR WASH,

*Debtor-Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

## BRIEF FOR RESPONDENT IN OPPOSITION.

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## SUBJECT INDEX


| | Page |
|---|---|
| Question Presented | 1 |
| Relevant Rules | 1 |
| Statement of the Case | 2 |
| Argument | 3 |
| Not a Single Reason for Granting the Writ Has Been Urged by Petitioner and None Exists | 3 |
| Conclusion | 4 |
| Appendix. Rule 19, Rules of the United States Supreme Court | 1 |
| Rule 23, Rules of the United States Supreme Court | 2 |
| Rule 52(a), Federal Rules of Civil Procedure | 2 |


---

## TABLE OF AUTHORITIES CITED

### Rules


| | |
|---|---|
| Federal Rules of Civil Procedure, Rule 52(a) | 1, 3 |
| United States Supreme Court Rules, Rule 19 | 1, 3 |
| United States Supreme Court Rules, Rule 23 | 1 |
| United States Supreme Court Rules, Rule 23(1)(h) | 3 |

IN THE

# Supreme Court of the United States

October Term, 1970
No. .....

CASCADE CAR WASH,

*Petitioner,*

*vs.*

LAURENT WATCH CO., INC., doing business as CASCADE CAR WASH,

*Debtor-Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

## BRIEF FOR RESPONDENT IN OPPOSITION.

### Question Presented.

Should this Honorable Court grant certiorari to review findings of fact made by a Referee in Bankruptcy which have been determined by both the United States District Court and the United States Court of Appeals for the Ninth Circuit not to be clearly erroneous?

### Relevant Rules.

The pertinent portion of Rules 19 and 23, United States Supreme Court Rules, are set forth in Appendix hereto as is Rule 52(a), Federal Rules of Civil Procedure.

**Statement of the Case.**

Petitioner seeks to review three orders of a Referee in Bankruptcy dated August 7, 1968, August 21, 1968 and September 6, 1968. Both the United States District Court and subsequently the United States Court of Appeals for the Ninth Circuit have determined these orders should be affirmed because they are based upon findings of fact supported by the evidence. All opinions are set forth in appendix form to the Petition for Writ of Certiorari.

The specific factual questions passed upon by the trier of fact were whether Respondent's leasehold was forfeited to Petitioner and whether certain objects affixed to real property were fixtures.

A third point—whether the Referee had power to modify a prior order—is apparently not now urged.

## ARGUMENT.

### Not a Single Reason for Granting the Writ Has Been Urged by Petitioner and None Exists.

Both the index and body of the Petition for Writ of Certiorari may be searched in vain for argument amplifying the reasons for the allowance of the writ as required by Rule 23(1)(h), United States Supreme Court Rules. In fact, no reasons are stated at all—although the Petition intertwines fact and argument thereon in contravention of universally accepted appellate practice.

It is not urged—and it does not appear—that there is any conflict in decisions, or important question of federal law, or grave departure from the usual course of judicial proceedings, or any of the other reasons for granting certiorari as set forth in Rule 19, United States Supreme Court Rules.

What does appear is that a referee in bankruptcy made a factual determination as to two real property issues. Under existing practice, the reviewing court affirms unless "clearly erroneous". Rule 52(a) F.R. Civ. P. Both the United States District Court and the United States Court of Appeals for the Ninth Circuit have carefully reviewed the record and found the findings not to be clearly erroneous. Petitioner simply attempts to bypass those determinations and retry the issues anew.

It is respectfully submitted that the Petition for Writ of Certiorari borders on frivolity.

## Conclusion.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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## APPENDIX.

### Rule 19, Rules of the United States Supreme Court.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgment of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

**Rule 23, Rules of the United States Supreme Court.**

1. The petition for writ of certiorari shall contain.

. . .

(h) A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 19.

**Rule 52(a), Federal Rules of Civil Procedure.**

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).